

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

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In the Matter of )  
)  
American Communications Services, Inc. )  
MCI Telecommunications Corp. )  
)  
Petitions for Expedited Declaratory Ruling )  
Preempting Arkansas Telecommunications )  
Regulatory Reform Act of 1997 Pursuant to )  
Sections 251, 252, and 253 of the )  
Communications Act of 1934, as amended )

CC Docket No. 97-100

**REPLY COMMENTS OF**  
**THE ARKANSAS TELECOMMUNICATIONS ASSOCIATION**

**I. INTRODUCTION**

The Arkansas Telecommunications Association<sup>1</sup> (hereinafter "ATA") provides these Reply Comments pursuant to the Public Notice (The Commission Seeks Comment Regarding Whether Universal Service Provisions of Arkansas Act Comport with Federal Law), CC Docket No. 97-100, DA 00-50 released January 14, 2000 (hereinafter "Public Notice"). The Commission gave all interested parties the opportunity to comment on whether Sections 4 and 5 of the Arkansas Act should be preempted due to any conflict with federal law or regulations.

The Commission provided this fresh opportunity to review Sections 4 and 5 of the Arkansas Act in light of the further development of federal law from the time the record was opened. Comments were filed by several parties pursuant to the Public Notice. Comments filed in support of

<sup>1</sup> The ATA is an association with membership that includes all the ILECs in Arkansas. The ATA does not, however, represent Southwestern Bell Telephone Company in this Docket because Southwestern Bell has separately participated in this docket.

Sections 4 and 5 were filed by several parties, including the Arkansas Attorney General.<sup>2</sup> The comments supportive of the Arkansas Act focus on the separate functions of the federal government and the states in providing universal service, the basis for federal preemption, the constitutional issues involved, and generally the different roles of federal and state government in the regulation of telecommunications service. The comments also restate and expand upon the justification of important aspects of Sections 4 and 5.

Two (2) comments were filed that request preemption by the Commission of parts of Section 5.<sup>3</sup> The ATA was unable to find a specific argument pertaining to preemption of Section 4. CenturyTel, Inc., (hereinafter “CenturyTel”) objects to three (3) subsections of Section 5. CenturyTel encourages the Commission to decline preemption of Section 4 and other areas of Section 5. Western Wireless Corporation (hereinafter “Western Wireless”) filed Comments objecting to four (4) subsections of Section 5. The combined objections of CenturyTel and Western Wireless request preemption of five (5) subsections of Section 5. The combined specific objections are to 5(a), 5(b)(1), 5(b)(2), 5(b)(5), and 5(d).

## **II. THE COMMENTS DO NOT JUSTIFY PREEMPTION**

First, the arguments relating to barriers to entry should be rejected by the Commission. As the Commission pointed out in the Arkansas Preemption Order<sup>4</sup>, a party requesting preemption due to a barrier to entry must apply the requirements of §253 of the Federal Act or show an example of an

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<sup>2</sup> Comments supportive of Sections 4 and 5 of the Arkansas Act were filed by the Arkansas Attorney General, the Arkansas Telecommunications Association, John Staurulakis, Inc., Southwestern Bell Telephone Company, and the Rural Arkansas Telephone Systems. CenturyTel, Inc. filed comments that were supportive of Section 4 and parts of Section 5

<sup>3</sup> See Comments of CenturyTel and Western Wireless.

<sup>4</sup> Arkansas Preemption Order, Federal Communications Commission, CC Docket No. 97-100, rel. December 23, 1999.

entity unable to provide a telecommunication service.<sup>5</sup> The comments do not apply the requirements of §253 to the Arkansas Act.<sup>6</sup> The comments do not establish how any entity is unable to provide a telecommunications service.<sup>7</sup>

#### **A. SECTION 4 SHOULD NOT BE PREEMPTED**

Section 4 of the Arkansas Act is not a focus of concern in the refreshed record. Section 4 establishes the Arkansas Universal Service Fund (hereinafter “AUSF”) and sets up its funding mechanism.<sup>8</sup> The development of the law establishes that a state may create explicit support mechanisms that are quite distinct from the FUSF. Arkansas uses the AUSF to move implicit support from various pools and mechanisms to explicit support through the AUSF. The loss of implicit support is offset through the explicit support from the AUSF. The AUSF requires a contribution from all providers of intrastate retail telecommunications services in order to ensure it is competitively neutral.<sup>9</sup> The AUSF has assisted in keeping the rates and services throughout Arkansas comparable as envisioned by the Arkansas Act. Section 4 should be left intact.

#### **B. RESPONSE TO SPECIFIC OBJECTIONS TO SECTION 5**

The specific objections to Section 5 all appear to apply to eligible telecommunications carrier (hereinafter “ETC”) designation and status. The ATA will respond to the specific objections to

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<sup>5</sup> Arkansas Preemption Order, paras. 17, 38, and 59.

<sup>6</sup> See Comments of CenturyTel and Western Wireless.

<sup>7</sup> See Id.

<sup>8</sup> Arkansas Act §4

<sup>9</sup> See Id.

Section 5 in order of the subsections in the Arkansas Act.

**Section 5(a)**

Western Wireless has an objection to §5(a). Section 5(a) purports to designate each incumbent local exchange carrier (hereinafter “ILEC”) as the ETC within the local exchange areas of the ILEC.<sup>10</sup> Western Wireless objects to § 5(a) automatically designating all the state’s ILECs as ETCs “without so much as a state commission determination they meet the requirements of § 214(e) (1).”<sup>11</sup> Western Wireless is not familiar with all the activities that occurred in Arkansas related to ETC designation. The ILECs have filed ETC statements and qualifications in a specific docket the Arkansas PSC opened for that purpose.<sup>12</sup> All that was required was done. Further, Western Wireless fails to show one (1) ETC designation for an ILEC in Arkansas that did not meet the requirements of the Federal Act.

ILECs are carriers of last resort in Arkansas. This status requires the ILEC to provide telecommunications service to all customers, even if such service is not profitable. An ILEC operates through its Certificate of Public Convenience and Necessity (hereinafter “CCN”).<sup>13</sup> The ILEC may lose its CCN, and thereby its ILEC status, if it fails to provide the types and quality of telecommunications service necessary to maintain a CCN. An ILEC must have a CCN to be an ETC. The ILECs have no free pass.

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<sup>10</sup> See Arkansas Act §5(a)

<sup>11</sup> Western Wireless Comments, pp. 5-6

<sup>12</sup> APSC Docket No. 97-326-U.

<sup>13</sup> See Ark. Code Ann. §23-3-201 et.seq.; Rules of Practice and Procedure of the Arkansas PSC, Rule 7.01. et seq.

### **Section 5(b)(1)**

Western Wireless objects to the requirement of § 5(b)(1) that an ETC must serve all customers in an ILEC's local exchange area.<sup>14</sup> Numerous arguments have been made regarding why this is appropriate. First, this requirement is competitively neutral. It applies to all ETCs. Further, states have a right to shape their universal service support in a manner distinct and different from the FUSF. Further, the states may require ETC eligibility requirements beyond those found in the Federal Act.<sup>15</sup>

Western Wireless makes the argument that the area to be served is unfair to wireless carriers. Western Wireless assumes it must use only wireless service to provide telecommunications service to an exchange area. However, the Arkansas Act allows telecommunications service to the exchange area to be through an entity's own facilities or through a combination of an entity's own facilities in combination with other facilities it might obtain through resale.<sup>16</sup>

Further, Western Wireless has not shown that the boundary of an exchange area in Arkansas would ever fail to coincide with the boundary of a wireless carrier. Western Wireless has not shown it will be unable to provide a telecommunications service due to the boundary of the area to be served. Arkansas has the right to set policy determining the area to be served to ensure investment, quality service, comparable rates, and prevent "cream skimming".

### **Section 5(b)(2)**

CenturyTel objects to part of § 5(b)(2). CenturyTel claims the Arkansas Act "prohibits an ETC from receiving universal service support except for the portion of their facilities that they own

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<sup>14</sup> See Western Wireless Comments, pp. 4-5.

<sup>15</sup> See Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5<sup>th</sup> Cir. 1999).

<sup>16</sup> See Arkansas Act §5(b)(1).

and maintain.”<sup>17</sup> The AUSF does not have to be identical to the FUSF. In addition, the Arkansas PSC has never specifically interpreted the meaning of § 5(b)(2). Intrastate universal service support may be targeted to high cost facilities to keep intrastate rates and services comparable, clearly, the provision is reasonable.

Section 5 (b)(2) furthers reasonable state policy. The funding is available for facilities to ensure all customers have access to telecommunication services at comparable rates. The revenue stream should flow to the entity which maintains the facilities and ultimately replaces the facilities. This encourages investment in high cost areas. The entity making a large investment to create facilities may receive the support for the investment from the AUSF. This is a reasonable method for Arkansas to keep the revenue stream predictable to encourage investment in facilities.

#### **Section 5(b)(5)**

Western Wireless and CenturyTel object to §5(b)(5). The objection to §5(b)(5) focuses on the Arkansas PSC making a public interest determination in non-rural areas. CenturyTel alleges that a public interest determination may only be made in a rural area. Western Wireless makes a similar argument. The provisions of §214(e)(2) allow a state to make a public interest determination in both rural and non-rural areas.

The Federal Act in §214 (e)(2) provides two (2) important terms in the underlined clause:

Upon request and consistent with the public interest, convenience, and necessity,  
the State commission may, in the case of an area served by a rural telephone  
company, and shall, in the case of all other areas . . . <sup>18</sup>

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<sup>17</sup> CenturyTel Comments page 10.

<sup>18</sup> See Federal Act § 214(e)(2).

The first term in the underlined clause is “upon request” and the second term is “consistent with the public interest, convenience, and necessity”. Both may be applied before a designation is made in a rural or non-rural area.

First, a “request” must be made in a rural or non-rural area for designation of an additional ETC. The ATA doubts that Western Wireless or CenturyTel would argue that a state commission must designate an additional ETC in a non-rural area without a “request” from a CLEC. A state PSC does not have the ability to “draft” a CLEC into service as an ETC. Congress never intended to impose the obligation upon a state to draft or recruit CLECs to become ETCs. The term, “upon request”, applies in both rural and non-rural areas.

If one of the two (2) terms in the clause apply to rural and non-rural areas, then the second term “consistent with the public interest, convenience and necessity, may also be applied in both rural and non-rural areas. The terms are connected by “and”. If the “request” term applies to both, then the public interest term may also be applied to both.

Further, it is unclear what level of review the Arkansas PSC would apply in such a determination. The review in a non-rural area may be limited to authority to act through a CCN. The Arkansas PSC currently requires a CLEC to obtain a CCN.<sup>19</sup> The CCN review includes, among other things, a review of the CLEC’s capacity to provide services.<sup>20</sup> Those asking for preemption have not shown any barriers to entry or improper motive for a public policy review in non-rural areas. If such intent existed at the Arkansas PSC, then the initial CCN review would be just as effective to prevent entry by a CLEC. The Arkansas PSC could simply refuse to issue a CCN to a CLEC. Such motive or intent does not exist. The provision is not inconsistent with federal law.

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<sup>19</sup> See Rules of Practice and Procedures of Arkansas PSC, Rule 7.05(f).

<sup>20</sup> Rules of Practice and Procedures of Arkansas PSC, Rule 7.05(f)(5).

### **Section 5(d)**

Both Western Wireless and CenturyTel object to §5(d). Section 5(d) involves the rural ILEC being the only eligible ETC in a rural area unless the designation is waived. The designation of the rural ILEC as the only ETC is consistent with federal law. Section 214 (e)(2) specifically provides the state with discretion to name only one (1) ETC in a rural area.<sup>21</sup> Section 214 provides a state “may” designate additional ETCs in a rural area.

The Arkansas General Assembly has delegated certain responsibilities to the Arkansas PSC. The Arkansas General Assembly has the right to make certain fundamental decisions prior to delegating regulatory authority to the Arkansas PSC. CenturyTel and Western Wireless have failed to point out an instance in which the designation of one ETC in a rural area in Arkansas is contrary to the public interest. A public interest determination has been made by the Arkansas General Assembly. The Federal Act does not require Arkansas to designate additional ETCs in rural areas. Arkansas has acted within its authority as set forth in the U.S. Constitution and the Federal Act to limit additional ETCs in rural areas.

### **III. CONCLUSION**

The refreshed comments provide guidance on any inconsistency between federal law and regulation and Sections 4 and 5 of the Arkansas Act. The remaining concerns are about ETC issues in Section 5. The roles of the state and federal government in providing telecommunications service are distinct and different. Each state may craft a mechanism to maintain comparable services and rates throughout that state. The support may be implicit or explicit. Arkansas has established an explicit support mechanism for that purpose.

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<sup>21</sup> The use of “may” in § 214(e)(2) makes the designation permissive.

The specific objections focus upon five (5) ETC issues in Section 5. After considering the refreshed comments and specific responses filed defending the five (5) subsections of Section 5 found objectionable by CenturyTel and Western Wireless, the Commission should decline to preempt any provision of Sections 4 and 5 of the Arkansas Act.

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